TRIUMPHS OR FAILINGS OF MODERN LEGAL SCHOLARSHIP AND THE CONDITIONS OF ITS PRODUCTION

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This symposium has successfully convened a set of commentaries on, and criticisms of, modern legal scholarship that is extraordinarily diverse. Indeed, at first glance, the diversity is so great as to resemble discordance: Meir Dan-Cohen's approving explanation of the growth of theoretical inquiry about the law[1] seems in conflict with John Henry Schlegel's lament about the infrequency of studies on the ordering of legal systems and of their even more infrequent introduction into the law school curriculum.[2] Similarly, Jean Stefancic's illuminating analysis of the contributions from the rise of law review symposia[3] and Mary Coombs's celebration of the increasing volume of "outsider" scholarship[4] seem to contradict David Bryden's complaints that there is "too much" modern scholarship and that its style is typically "awful."[5] Perhaps curiously, I believe that each of these authors accurately identifies an important feature of modern scholarship. And far from discordant or contradictory, these various features can be understood by a simple description of modern legal scholarship's conditions of production.

Let me first disclaim the comprehensiveness of my own analysis. Far from a careful study of the conditions of supply of, and demand for, legal scholarship, my comments are little more than a back-of-the-envelope sketch. But even a brief review of the organization of the legal scholarship industry and its changes over the last few decades is suggestive of the sources of both the criticisms and the encomia we have seen.

As is hardly controversial, in the decades since the War, the legal

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1. Meir Dan-Cohen, *Listeners and Eavesdroppers: Substantive Legal Theory and its Audience*, 63 U. COLO. L. REV. 569 (1992).

2. John Henry Schlegel, *A Certain Narcissism; A Slight Unseemliness*, 63 U. COLO. L. REV. 595 (1992).

3. Jean Stefancic, *The Law Review Symposium Issue: Community of Meaning or Re-inscription of the Hierarchy?*, 63 U. COLO. L. REV. 651 (1992).

4. Mary Coombs, *Outsider Scholarship: The Law Review Stories*, 63 U. COLO. L. REV. 683 (1992).

5. David P. Bryden, *Scholarship About Scholarship*, 63 U. COLO. L. REV. 641 (1992).

profession and legal scholarship have been greatly affected by two developments which I shall simply accept as background conditions: first, the extraordinary increase in the demand for legal services and, concomitantly, in the number of law students and law schools to train them;[6] second, the increase in influence of social scientific and humanistic approaches to understanding and evaluating the law, a trend which I have described elsewhere.[7] I shall not try here to explain these developments, but only to assert that their implications help to illuminate the commentaries of the various authors in the symposium.

The first important characteristic of the conditions of production of legal scholarship is the source of demand for, or "consumption" of, the product. The demand for law review articles is dominated, not by consumption by readers or subscribers, but by consumption by student editors. I am doubtful that there is a single law review or law-related specialty journal (such as, say, the *Journal of Legal Studies* or the *Journal of Law and Literature*) that supports itself on receipts from readers or subscribers. All law journals are subsidized in some way: most by the law schools at which they are published; some specialty journals, by charitable foundations interested in supporting the particular subject matter in which the journal concentrates.

What accounts for this extraordinary level of systematic subsidization? The term "subsidy" is not quite accurate, for journals appear to be subsidized only when analyzed from the vantage of readers. In contrast, from the vantage of the law schools that support them, journals are an investment. Law schools invest in student-edited journals, among other reasons, as a means of competing both for student applicants and in the market for student placement. As the demand for, and returns to, lawyers have dramatically increased, the number of law schools has increased,[8] and the competition among them has increased.[9] As a consequence, law schools today must compete over all non-geographically captured students, must compete to place their graduates in promising positions, and serve to gain from successful competition both in terms of steady tuition revenues and, where very successful, of subsequent donations from prosperous alumni. Today, quite unlike the 1940s, it would be unthinkable for a law school to conceive of itself as a competitor in either the applicant or placement

6. *See* B. Peter Pashigian, *The Market for Lawyers: The Determinants of the Demand for and Supply of Lawyers*, 20 J.L. & ECON. 53 (1977).

7. George L. Priest, *Social Science Theory and Legal Education: The Law School as University*, 33 J. LEGAL ED. 437 (1983).

8. *See* Pashigian, *supra* note 6.

9. Again, I am describing broad trends since the War, rather than specific competitive conditions at any moment, and can only recommend more careful study of the problem.

market without sponsoring a law review. A law review represents a continuing reputational investment for a law school's students and for its alumni. In this respect, a law review to a serious law school resembles a winning football team to a major (non-Ivy League) university.

These investments are hardly improvident. Surely, students who have devoted thousands of hours to editing articles bring more skills to the marketplace. But the implications of this source of demand for legal scholarship are very important. The principal demand for legal scholarship is not a demand by readers, searching for insights; it is a demand by editors, searching for material to edit. David Bryden's complaints that there is too much modern legal scholarship and that its style is bad,[10] now become totally comprehensible. A reader may well conclude that the benefits of much of modern legal scholarship are less than any estimation of costs, but the calculus misunderstands the conditions of production. The benefits of much of modern scholarship may not be equal to the opportunity cost of the time value to the reader—Professor Bryden's complaint—even ignoring publication and distribution costs, not to mention properly apportioned time costs of writing the work and, possibly greater, time costs of student editing. But the benefits to readers of modern scholarship are secondary benefits; the primary benefit is as material upon which students may exercise editorial judgment, thus improving their skills and, in turn, the reputations of their law schools. It cannot be said that law reviews demand articles more rather than less susceptible to editing, but the demand is surely for manuscript pages rather than for novel insights.

What surely follows and what we have surely seen is a plethora of legal journals in this country and many thousands of annually published pages. The second principal consideration for understanding the characteristics of modern legal scholarship is the determinants of the allocation of scholarship among these many journals. In more typical markets, of course, one would predict resources to be allocated according to highest valued use. Moreover, considering the competition among the hundreds of law journals for material to publish, one might imagine the principle of allocating according to highest value to be especially effective. That simple economic principle, however, is not very helpful for understanding the allocation of legal scholarship, largely because the operative "values" directing allocation are complex and often push in different directions.

That is, one might imagine an allocation of scholarship according to merit, with the emergence of some set of superior or more prominent journals that publish the best work, with journals of slightly

10. Bryden, *supra* note 5.

lesser merit publishing the next best work, and so on. An allocation of that nature, however, is largely foreign to American legal scholarship. Each of us might be able to list the five or ten best articles of the year or decade and find that our list overlaps to some extent with those of other academics. But it is a remote possibility that the consensus best articles today—perhaps in contrast to earlier decades—would be found published within a small set of journals.

But the failure of this definition of merit should not be surprising. Expectations of this nature about allocation according to merit derive from the vantage of the reader, which again, does not reflect the principal operative force in the production of legal scholarship. Most law journals are edited by students. With respect to the selection of articles for publication, students cannot be expected to be perfect agents of journal readers. First, students serve as editors for very short periods, seldom more than a year, implying little specific personal return from consistency of production.[11] Second, given the large number of journals and the ease to most authors of securing acceptance for publication, the ratio of time spent editing to time spent authoring is typically very high. Faculty members at many schools frequently complain that the student editorial boards at their school's journal make publication decisions on political grounds or on grounds of personal preference, all that differ from board to board reducing consistency of quality over time.[12] But if students are spending almost as much time editing as the author has spent writing the article, why shouldn't students accept for publication articles that they prefer to edit? Again, readers are not paying their way through subscription revenues in any event. Nevertheless, an allocation mechanism influenced to some degree by merit but probably to a greater degree by student preferences which change over time leads to some level of randomness in article allocation among legal journals. There have been two major developments in the production of legal scholarship within the last two decades that can be interpreted as efforts to overcome this randomness: the rise of specialized journals and, where interest in a particular subject is not sufficiently great to sustain a continuing journal, the rise in symposia issues. The rise of specialized journals and symposia largely reflect the interests of authors and readers: authors,

11. Faculty-edited journals are substantially different in this respect, especially where individual faculty members have accepted the position as an important component of their careers. The extraordinary stewardship of the *Journal of Law and Economics* under Aaron Director and Ronald H. Coase is a prominent example. *See* Edmund W. Kitch, *The Fire of Truth: A Remembrance of Law and Economics at Chicago, 1932-1970*, 26 J.L. & ECON. 163 (1983).

12. Of course, the more common complaint is that student preferences conflict with a faculty member's own preference, especially for his or her work.

to more effectively corral an audience for their work; and readers, especially readers with particular interests, to reduce the search costs of identifying material relevant to these interests.

It should be seen at the outset that the advantages of specialized journals or symposia publications are not equivalent for different types of legal scholarship. Consider, as examples, three types of articles. Obviously, articles relating to jurisdictionally-specific legal problems almost universally are published in a journal within the jurisdiction. For instance, if I were to write an article on specific questions of products liability law in Connecticut, it would make no sense to publish it in, say, a Texas journal. The relevant readers of the article are likely to be lawyers and judges in Connecticut who—once some sorting mechanism is in place—are unlikely to subscribe to most non-state journals. Similarly, student editors in Texas will have little interest in Connecticut law.

In contrast, if I were to write an article addressing a particular legal problem that could arise in any state, the location of publication becomes much less important. Articles addressing specific legal issues or providing specific doctrinal analyses may be seldom read by the general subscriber population, because they become relevant only when the reader faces the particular legal issue that is the subject of the article. Indeed, with the extraordinary improvements recently in computer-accessed search, the location of publication may be largely a matter of indifference. As long as the article remains accessible, random selection among journals will have no influence on the article's success.

In further contrast, however, imagine an article written principally to influence other academics—scholarship of the nature celebrated by Meir Dan-Cohen, substantive legal theory.[13] For this form of scholarship, random selection of publication would represent near-death to the article. Most academics, of course, try to keep current. But given the large number of legal journals, keeping current is very costly. Most—including myself—cannot routinely scan large numbers of journals, but rely on published indices, such as the excellent University of Washington journal index. But any index, however helpful over some range, cannot very successfully alert one to important theoretical advances, if only because all indices are necessarily bound to their own index categories which, by definition, cannot anticipate theoretical advances.

It is for this third form of scholarship that the specialized journal and the symposia are most beneficial because these forms of publica-

13. Dan-Cohen, *supra* note 1.

tion, by focusing a readership, simultaneously focus authorship. For academics engaging in scholarly conversation with other academics, this focus is exceptionally attractive. In my own field, for example, there are now six specialized journals for articles in law and economics in addition to large numbers of yearly symposia.

The rise of specialized journals and symposia,[14] of course, implies greater diversity in legal scholarship and greater fragmentation among the academy. Mary Coombs at once laments that an important group of scholars are "outsiders" while proudly describing their accomplishments. Specialization in legal scholarship is a broader phenomenon, however, and is characteristic not only of work related to race and sex, but to all fields of legal inquiry.[15] In this respect, though I do not mean to diminish the significance of the term for feminists or people of color, all serious scholars are outsiders working within some narrow bubble of academic concern. Modern legal scholarship is best characterized as comprising hundreds of specialized bubbles of this nature—some larger and smaller, some overlapping with others over some range and departing at others—all advancing toward greater understanding of the operation of the law.

As Adam Smith described centuries ago, however, the increasing division of labor is a measure of the wealth of a culture, not of its poverty. I share completely my friend Jack Schlegel's concerns about the continuing traditional focus of much of modern law teaching.[16] But I believe that it is a mistake to evaluate the conditions of modern legal scholarship from the state of the current law school curriculum. Indeed, it is a signal of the great strength of modern legal scholarship that the number of specialized journals and symposia issues have increased so dramatically in recent years. These developments, well documented in the articles in this very symposium, demonstrate the power and vitality of modern legal scholarship, a power and vitality far greater than that of any earlier period of legal education.

14. Documented both in Stefancic, *supra* note 3, and, for a subset of interests, in Coombs, *supra* note 4.

15. *See* Priest, *supra* note 7.

16. *See* Schlegel, *supra* note 2.